

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1348

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

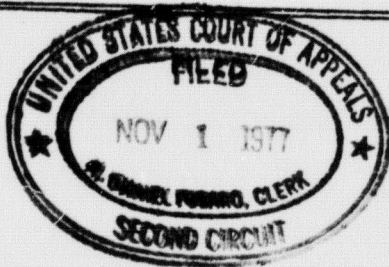
v.

ANDREW TSANAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT ANDREW TSANAS



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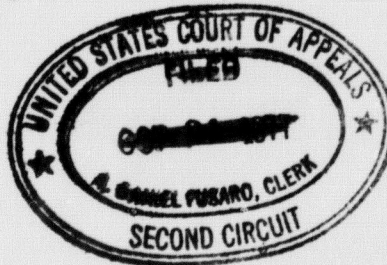


TABLE OF CONTENTS

	<u>Page</u>
<u>POINT I</u>	
THE AUTHORITIES, INCLUDING TWO CITED BY THE GOVERNMENT, SUPPORT APPELLANT'S ARGUMENT THAT THE JURY MAY MOVE TO THE LESSER OFFENSE WITHOUT FIRST ACQUITTING ON THE GREATER.....	1
<u>POINT II</u>	
THE GOVERNMENT HAS MISSTATED THE RECORD OR AUTHORITIES ON THE OTHER POINTS RAISED BY APPELLANT.....	5
<u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1968)	1
Green v. United States, 355 U.S. 184 (1957)	3
United States v. Amparo, Docket No. 77-1256	3
United States v. Dixon, 507 F.2d 638 (8th Cir. 1974)	2
United States v. White, 225 F.Supp. 514 (D.D.C. 1963)	2

Other

26 U.S.C. 7201	5
26 U.S.C. 7207	5
26 U.S.C. 6103	6
F.R.CRIM.P. 16	6
Devitt & Blackmar's Federal Jury Practice and Instructions	1

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REPLY BRIEF FOR APPELLANT,
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POINT I

THE AUTHORITIES, INCLUDING TWO CITED BY THE
GOVERNMENT, SUPPORT APPELLANT'S ARGUMENT THAT
THE JURY MAY MOVE TO THE LESSER OFFENSE WITH-
OUT FIRST ACQUITTING ON THE GREATER.

We focus first on the lesser offense issue (Tsanas Brief, "DBr", pp. 10-12; Government's Brief, "GBr", pp. 10-11). Fuller v. United States, 407 F.2d 1199 (D.C. Cir. 1968) (GBr 11) does say that the jury should move to the lesser offense only if it acquits first on the greater*, but without really addressing the point or having to because it wasn't raised. So does the 1970 edition of Devitt & Blackmar's Federal Jury Practice and Instructions. The 1977 edition, however, demonstrates that several courts have not followed that road but have instead permitted

* That is the only case cited by the Government which does.

jury consideration of the lesser offense after a deadlock on the greater, for example, United States v. Dixon, 507 F.2d 638 (8th Cir. 1974) in which the jury was instructed to move to the lesser possession count after deadlock on the greater robbery count; and the recent "Squeaky Fromme" trial in California's Eastern District in which "the court . . . permit [ted] consideration of the lesser offense . . . if the jury should unanimously find the accused not guilty of the crime charged in the indictment, or, if the jury is unable to make a determination as to the guilt or innocence of the accused as to the crime charged in the indictment . . ." (emphasis supplied). Sec. 18.05 at 583. The authors concede, moreover, "that juries often agree on a lesser offense because they are unable to reach consensus on the greater". Ibid.

Beyond that, United States v. White, 225 F.Supp. 514 (D.D.C. 1963) (GBr 11) does not support the Government, it squarely supports us. The court recites its instruction (225 F.Supp. at 519):

"The jurors were told that if they were not unanimously convinced that the Government had proved beyond a reasonable doubt that the defendant was guilty of first degree murder, then they should pass on to a consideration of the lesser included offense of second degree murder; and that if they were not unanimously convinced that the Government had proven beyond a reasonable doubt that the defendant was guilty of second degree murder, then they should pass on to a consideration of the second lesser included offense of manslaughter; and that if they were not unanimously convinced that the Government had proven beyond a reasonable doubt that the defendant was guilty of manslaughter, then their verdict must be not guilty."

See also, United States v. Amparo, Docket No. 77-1256, in this Court, in which Judge Stewart of the Southern District refused to give the "acquit first" charge which Judge Mishler gave here, instructing instead that the jury could move to the lesser offense as long as it was not returning a guilty verdict on the greater count.

Finally, Green v. United States, 355 U.S. 184 (1957), the leading authority on the double jeopardy issue (DBr 11), is in our favor. There, the district judge let the jury move to the lesser count without any finding on the greater, and then dismissed the jury after it brought in a guilty verdict solely on the lesser offense. The Supreme Court held that the verdict was an "implied acquittal" which prevented a retrial on the greater count.

The plain implication is that if there were no "implied acquittal", e.g., an express determination of deadlock on the greater before moving to the lesser, the Government could have had its conviction on the lesser and then a retrial on the greater. The decision sanctions, we submit, the charge we urge should have been given here.

We return to the point of our main brief. There may well be a juror who has doubts on the greater offense but feels that defendant is guilty of the lesser, and is not prepared to see defendant walk away free from the courtroom. If that juror is told the lesser offense does not come into play without an acquittal on the greater, and if he cannot convince the rest of his doubts on the greater, he may then go along with their contrary view in order to

give the Government some conviction.* We see no basis for such a result. The lesser offense concept is designed to give the Government, but no less the defendant, an opportunity for the jury to consider the hierarchy of charges which flow from the Government's evidence, as long as there is a distinguishing basis, and there was here.** The "acquit first" charge in this case defeated that purpose.

* It bears on this that the jurors do not know (indeed, are not allowed to know) the penalties on the various charges. Our juror, therefore, does not know exactly what he is letting defendant in for when he goes along with conviction on the greater charge.

** GBr 10 n. 5 suggests that there needn't have been a lesser offense charge in the first place. Judge Mishler thought otherwise and so did the jury. They were right and the Government wrong since in each case the Government might prove a false statement but not necessarily that substantial taxes were due.

POINT II

THE GOVERNMENT HAS MISSTATED THE RECORD OR AUTHORITIES ON THE OTHER POINTS RAISED BY APPELLANT.

We address ~~seriatim~~ the remainder of the Government's points.

1. The Government recites its case as if there were facts which must be taken as proven (GBr 2). The fact, however, is that the jury refused to credit a substantial part of the Government's evidence (DBr 10), particularly Lazar's testimony.

2. The Government suggests there was no need to charge Sec. 7207 because Tsanas was not entitled to a lesser offense charge in the first place. We have shown above that he was. Given that, Sec. 7207 should have been charged as well. Indeed, when the point was first raised (1204-5), the district court noted that the charge book included Sec. 7207 as the appropriate lesser offense under Sec. 7201, and the only reason the Government could urge in opposition was a "longstanding Department of Justice policy that they did not authorize any indictment pursuant to 7207" (1204), a policy which had no bearing on the issue of the proper charge.

3. The Government argues it was privileged to withhold Lazar's corporate tax returns since they were not material to, or could not "directly affect" the resolution of any issue (GBr 15). Yet the Assistant who tried the case thought enough of the corporate tax to ask Lazar about it on direct (DBr 17). If they were material for purposes of the Assistant's examination, they were certainly material to defendant's. This was enough for the Court to order

their production and for the Government to obey the order under 26 U.S.C. 6103(h)(4)(D) which requires disclosure "to the extent required by order of a court pursuant to section 3500 of Title 18, United States Code, or Rule 16 of the Federal Rules of Criminal Procedure . . .".

In addition, production did "directly affect" Tsanas within 26 U.S.C. 6103(4)(c). The Government cites no authority which would require defendant to demonstrate that he will win with the return but lose without it before he is given access under that section. The voluminous corporate books and records, of which defendant could not make heads or tails in the short time he had them, were not an adequate substitute (DBr 8-9).

4. We have no problem now, and had none at the outset of the trial, with initial general questioning of the jurors for prejudice from pre-trial publicity (GBr 9). The problem is that the episode with Tsanas' wife (DBr 17) showed that general questioning could not do the job; jurors had seen the articles but were reluctant to volunteer, probably because they had already sat through most of the case and wanted to continue through the rest. In that situation, the only sure safeguard was individual questioning of the jurors as to whether they had seen the Daily News article, a safeguard which the district court did not adopt, but to which Tsanas was entitled. This requires reversal, there being no substance to the Government's argument (GBr 18, n.9) that reading an article that his wife had pleaded guilty would not effect a juror's consideration of the case against Tsanas.

5. Prior to the district court's gift charge, defendant's counsel submitted a letter of several pages outlining the requirements he wanted. The district court's failure to adopt those preserves the issue.

We will not dwell on specific points the Government urges to support the district court charge (GBr 13-14). As shown in our main brief (DBr 12-16), the jury was not given the basic concepts in the gift area which it had to have and understand to resolve this crucial issue in the case.

CONCLUSION

In the Government's view (GBr 3), its evidence was overwhelming. In the jury's view, it was not. The jury's legal conclusions, however, should not be permitted to stand in the face of a district court lesser offense charge which unfairly coerced the jury's consideration of that issue, and the other errors we have urged. There should be a reversal.

Respectfully submitted,

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